Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *ET AL.*,

PETITIONERS,

v.

LAURA NEZTSOSIE, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
NationsBank Tower
Suite 1000
Albuquerque, NM 87102
(505) 848-1800

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044-/566
(202) 662-6000

Tom Galbraith
MEYER HENDRICKS & BIVENS, P.A.
3003 North Central Avenue
Suite 1200
Phoenix, AZ 85012-2199
(602) 604-2172

Attorneys for Petitioners

*Counsel of Record

26pp

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

In addition to the entities identified in the Rule 29.6 statement in the Brief for Petitioners, an additional non-wholly owned affiliate of El Paso Natural Gas Company is Fife Power.

TABLE OF CONTENTS

Page

Statement Pursuant to Supreme Court Rule 29.6 i

Table of Contents i

Table of Authorities ii

Reply Brief of Petitioners 1

A. Respondents' Tribal Law Claims Are Within the Scope of Price-Anderson and Are Therefore Preempted. 1

B. Tribal Exhaustion on the Preemption Issue Would Serve No Useful Purpose and Would Frustrate the Basic Objectives of Price-Anderson. 13

C. Having Failed To Appeal the District Court's Injunctions, Respondents May Not Assert Price-Anderson Claims in Tribal Court. 16

D. Tribal Courts Lack Jurisdiction To Hear Price-Anderson Claims. 18

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 10

Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 20

Auer v. Robbins, 117 S. Ct. 905 (1997) 6

Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976) 17

Bates v. United States, 118 S. Ct. 285 (1997) 7

Begay v. United States, 591 F. Supp. 991 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985) 3-4

Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257 (1978) 16

Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985) 13

Crist v. Dickson Welding, Inc., 957 F.2d 1281 5th Cir. 1992) 18

EF Operating Corp. v. American Bldgs., 993 F.2d 1046 (3d Cir. 1993) 18

Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). 7

Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95 (1941) 9

Gassie v. SMH Swiss Corp., 1998 WL 71647 (E.D. La. Feb. 17, 1998) 6

Gilberg v. Stepan Co., 24 F.Supp. 2d 325, *aff'd*, CA-98-139 (KSH) (D.N.J. Dec. 14, 1998) 6

Granberry v. Greer, 481 U.S. 129 (1987) 14

In re TMI Litig. Cases Consol. II, 940 F.2d 832 (3d Cir. 1991) 2, 10, 11, 15

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 14

Johnson v. Teamsters Local 559, 102 F.3d 21 (1st. Cir. 1996) 17, 18

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) 6, 8

Knowles v. Iowa, 119 S. Ct. 484 (1998) 1

Langnes v. Green, 282 U.S. 531, 537 (1931) 17-18

Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990) 1-2

Marts v. Hines, 117 F.3d 1504 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 716 (1998) 18

Mesa v. California, 489 U.S. 121 (1989) 10

Montana v. United States, 450 U.S. 544 (1981) 14

Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937) 18

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) 14, 16

Northeast Ohio Reg'l Sewer District v. Advanced Med. System, Inc., 666 N.E.2d 612 (Ohio Ct. App. 1995) 6

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) 9-10

O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) 10

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 19

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 20

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 20

Robicheaux v. Radcliff Material, Inc., 697 F.2d 662 (5th Cir. 1983) 18

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 8, 15

Stockstill v. Petty Ray Geophysical, Division of Geosource, Inc., 888 F.2d 1493 (5th Cir. 1989) 18

Strate v. A-1 Contractors, 520 U.S. 438 (1997) 13-15, 16, 19-20

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 17-18

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 10, 12

United States v. Alaska, 117 S. Ct. 1888 (1997) 7

Young Radiator Co. v. Celotex Corp., 881 F.2d 1408 (7th Cir. 1989) 18

Constitution, Statutes and Rules

U.S. Const. art. I 9

U.S. Const. art. III 9-13

Assimilative Crimes Act, 18 U.S.C. § 13 10

Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 4

Atomic Energy Act of 1954, *as amended*

42 U.S.C. § 2012(a) 9
42 U.S.C. § 2014(e) 2
42 U.S.C. § 2014(j) 8
42 U.S.C. § 2014(q) 2, 7, 8-9
42 U.S.C. § 2014(t) 6-8
42 U.S.C. § 2014(w) 2, 6
42 U.S.C. § 2014(z) 2
42 U.S.C. § 2014(aa) 2
42 U.S.C. § 2014(hh) 1, 2, 6, 10-12, 15, 20
42 U.S.C. § 2092 4-5
42 U.S.C. § 2201(b) 4-5
42 U.S.C. § 2210(e)(1) 7
42 U.S.C. § 2210(h) 19
42 U.S.C. § 2210(i) 19
42 U.S.C. § 2210(m) 19
42 U.S.C. § 2210(n) 7, 9, 10, 13, 16, 19
42 U.S.C. § 2210(o) 19
42 U.S.C. § 2210(s) 7

Federal Reservations Act, 16 U.S.C. § 457 10

Federal Tort Claims Act, 28 U.S.C. § 1346(b) 10

Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 12

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* 10

28 U.S.C. § 1331 ..... 10, 16

28 U.S.C. § 1367 13

S. Ct. Rule 15.2 1

Fed. R. App. P. 2 17

Fed. R. App. P. 3 17

Fed. R. App. P. 4 17-18

Regulations and Notices

12 Fed. Reg. 1855 (1947) 5
19 Fed. Reg. 5628 (1954) 5
22 Fed. Reg. 548 (1957) 5
25 Fed. Reg. 8619 (1960) 5
26 Fed. Reg. 284 (1961) 5
10 C.F.R. pt. 20 (1998) 5
10 C.F.R. § 40.13(b) (1998) 5

Legislative Materials

H.R. Rep. No. 100-104 (1987) 8, 10, 11
S. Rep. No. 100-218 (1987) 8, 13
Reauthorization of the Price-Anderson Act, Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. (1986) 11

Miscellaneous

13 Charles A. Wright, et al., *Federal Practice and Procedure* (2d ed.) 15-16, 17
Fed. R. App. P. Adv. Comm. Notes 17

REPLY BRIEF OF PETITIONERS

By making arguments not previously raised and by reversing course on others, respondents seek to avoid the dispositive issues before this Court. In tribal court, respondents asserted only tribal law claims and disavowed any reliance on Price-Anderson's "public liability" remedy. They took that same position in the federal district court and court of appeals, even to the point of not appealing injunctions that limited the tribal court proceedings to the claims then pleaded – those based on tribal law. It is clear that those tribal-law claims are preempted by the Price-Anderson Act, and there is no plausible ground for requiring exhaustion of tribal remedies that – as a matter of federal law – have been barred by act of Congress.

A. Respondents' Tribal Law Claims Are Within the Scope of Price-Anderson and Are Therefore Preempted.

1. For the first time in this litigation, respondents acknowledge that their tribal law claims are precluded by the Price-Anderson Act if those claims are within the statute's definition of a "public liability action." 42 U.S.C. § 2014(hh); *see* Resp. Br. 1-2, 23-24. Respondents argue, however, that it is not "plain" that their claims fall within that definition. Their arguments on this point were not made in opposition to the petition for certiorari and, indeed, only one (concerning the need for an indemnification agreement) was raised in the lower courts. Accordingly, those arguments are not properly before the Court and should be disregarded.[1]

---

[1] *E.g., Knowles v. Iowa*, 119 S. Ct. 484, 487 n.2 (1998) (under S. Ct. Rule 15.2, respondent's non-jurisdictional arguments that were not raised in the opposition to certiorari were not properly preserved); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990) (an argument not (...continued)

Even if considered, respondents' arguments are without merit. In respondents' own words, the reach of the Atomic Energy Act is "concededly broad" and the operative term "public liability action" is "broadly defined." Resp. Br. 28. Since amended in 1988 in order to federalize the law of nuclear torts (Pet. Br. 16-22; U.S. Br. 17-19), Price-Anderson embraces "*any* suit asserting public liability" (42 U.S.C. § 2014(hh)), which means "*any* legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). "[N]uclear incident" includes "*any* occurrence" that causes injuries or death from the "radioactive, toxic, explosive, or other hazardous properties" of nuclear materials. *Id.* § 2014(q).[2]

According to their tribal court complaints, respondents' injuries were caused by one or more of the nuclear materials that trigger a Price-Anderson "public liability action." They allege injury from exposure to radioactive and toxic uranium mine and mill materials including uranium, uranium ore, plutonium, and mill tailings. *E.g.*, App. 20a-21a, 23a-24a, 40a-41a, 48a. Each of these is either a "source material," "byproduct material," or "special nuclear material" within the scope of both the Atomic Energy Act and Price-Anderson. *See* 42 U.S.C. § 2014(e), (z) & (aa); Pet. Br. 10 n.6. A "nuclear incident" occurs whenever there is injury from such materials (42 U.S.C. § 2014(q)), and a suit seeking compensation for those injuries must be brought as a Price-Anderson "public liability action" or not at all (*id.* § 2014(hh)).[3] *See also* U.S. Br. 26-30.

---

presented to either court below and not supported by arguments in the record will not be considered).

[2] Emphasis added in each definition.

[3] "A claim growing out of any nuclear incident is compensable under the terms of [Price-Anderson] or *it is not compensable at all.*" *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) (emphasis in original). *See also* other cases cited at Pet. Br. 21 and U.S. Br. 18 n.10.

2. Respondents nonetheless claim, in an unabashed rewriting of the Questions Presented (Resp. Br. i), that their suits "are based on activities apparently *outside* the substantive scope of the Price-Anderson Act and of the Atomic Energy Act." (Emphasis added.) They make this argument on grounds having little or no foundation in actual statutory text: that their injuries arise from uranium *mining*, which they say is outside AEA jurisdiction (Resp. Br. 29-30), and that Price-Anderson's "public liability action" should be limited to nuclear incidents for which a federal indemnification agreement exists (*id.* at 31-38). Neither argument has merit. Indeed, it is simply irrelevant whether or not federal law imposed substantive obligations on the mining and milling activities at issue, or whether or not an indemnification agreement applied. The relevant provisions of Price-Anderson mean what they say, and they are not limited as respondents suggest.

a. First, respondents' argument that uranium mining is outside the scope Price-Anderson was not raised in either lower court or in opposition to the petition for certiorari. It should be rejected as not properly preserved. *See* n.1 *supra*.

Second, neither the AEA nor Price-Anderson contains any exemption for uranium mining activities.[4] It is true that the AEC and NRC have not exercised broad, OSHA-type regulation over mining. *See generally Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985) (describing regulatory history of ura-

---

[4] In any event, mill processing is indisputably subject to AEC licensing and other regulatory controls, and respondents acknowledge that the Richards tribal court complaint expressly challenges uranium *milling* as well as mining activities, including milling activities by Cyprus's predecessor. *See* App. 40a-45a; Resp. Br. 11 n.14. Factual issues that are suggested by respondents for the first time in their brief, such as when a particular mill was constructed and to which mills Mr. Richards was exposed, do not serve to take their complaint outside the scope of Price-Anderson.

nium mines in and near the Navajo reservation). But that is not germane. Respondents' claims are unlike those in *Begay*, a pre-1988 Amendments case, in which underground uranium miners alleged that they contracted lung cancer from exposure to radium and radon gas. The *Begay* court decided that radium and radon gas "were not covered by the definitions of source, byproduct or special nuclear material, [and thus] they were not subject to AEC's regulatory authority." 591 F. Supp. at 1003. Whether or not that categorization of radium and radon gas was correct (and, the court was construing AEA regulatory provisions and not Price-Anderson), respondents here have raised claims based on the radioactive and toxic effects of statutory nuclear materials. Clearly, tort claims based on exposure to such nuclear materials are within Price-Anderson. Respondents do not even hint at a textual basis for arguing otherwise.

Further, the AEA *does* establish federal jurisdiction over mine operators' handling of source material and – where applicable – byproduct and special nuclear materials. Section 161 gave the AEC (now, the NRC) broad authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b). This authority is not limited by the location of the nuclear material or the entity in possession. Respondents emphasize a qualification in a different provision, AEA § 62, which requires source material licenses only "after [the source material's] removal from its place of deposit in nature." 42 U.S.C. § 2092; *see* Resp. Br. 4-5, 29. Based on that language, the AEC concluded that it would not require licenses for the mining process itself, but nonetheless miners were required to have licenses for the transfer and shipment of their uranium ore.[5] Section 62's limitation on one particular licensing requirement did not diminish the Commission's unqualified general authority under section 161 to regulate all "possession and use" of source material, and AEC decisions not to fully exercise its jurisdiction did not undermine its plenary authority over source material and other statutory nuclear materials. Finally, those agency policy judgments on what to regulate and what to exempt from regulation cannot in any event effect a reduction in Price-Anderson's unqualified statutory scope.[6]

b. Respondents also argue that nuclear torts qualify as Price-Anderson "public liability actions" only where a government indemnification agreement applies to the nuclear incident in question. This argument was not raised in the opposition to certiorari, rests on an artificial reading of statutory language, and is contrary to the considered views of

---

[5] *See, e.g.*, Notice of Proposed Rulemaking, 25 Fed. Reg. 8619 (1960) ("Under the present regulation, miners are required to have a license to transfer the source material after it is mined"; AEA § 62 "does not, however, require a license for the mining of the source material").

License requirements were initially imposed under the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (*see* 12 Fed. Reg. 1855 (1947) ("Control of Source Material")), and carried forward upon adoption of the AEA in 1954. 19 Fed. Reg. 5628 (1954). All licensees, including miners with source material licenses such as petitioners, were subject to comprehensive standards dealing with radiation hazards. *See* 22 Fed. Reg. 548 (1957) ("Standards for Protection Against Radiation"). Those standards, the current version of which is found at 10 C.F.R. pt. 20 (1998), contained specific restrictions on the use and transfer of uranium ore and other licensed material, including levels of permissible radiation exposure and radiation releases into the air and water, and on waste disposal.

Subsequently, in 1961, the Commission exempted transfers of unrefined and unprocessed ore from this licensing requirement. 26 Fed. Reg. 284 (1961), *currently codified at* 10 C.F.R. § 40.13(b). But, because the mining activities at issue in this litigation occurred primarily in the 1950s, respondents' claim that miners were unregulated is incorrect.

[6] Nor does it follow that the preemptive effect of AEA regulatory jurisdiction is thereby diminished. *See* pp. 19-20 n.31 *infra*.

the NRC and DOE, the two agencies charged with administering the Price-Anderson Act. *See* U.S. Br. 27-30.[7] It is also at odds with the views of virtually all courts that have addressed the issue.[8]

Respondents argue that the scope of "public liability action" (42 U.S.C. § 2014(hh)) is restricted by the definition of "person indemnified" (§ 2014(t)), even though the latter term nowhere appears in the former. They observe that the "person indemnified" definition includes those with federal indemnification agreements "*and* any other person who may be liable for public liability." § 2014(t) (emphasis added). It follows – respondents argue – that for every "public liability" there must be a "person indemnified," and hence there can be no "public liability" (§ 2014(w)) or "public liability action" (§ 2014(hh)) without an indemnification agreement. Resp. Br. 31-32.

This argument reads the statute backwards, plucking from the definition of "person indemnified" a phrase that is intended to broaden that term, and then claiming that the broadened term operates to restrict dramatically the scope of other provisions that do not even reference "person indemnified." Section 2014(hh)'s definition of "public liability action," for example, contains no hint that it is limited to

[7] The views of these agencies are entitled to substantial deference. *See Auer v. Robbins*, 117 S. Ct. 905, 912 (1997) (Secretary of Labor's regulatory interpretation, even though stated for the first time in *amicus* brief, is entitled to deference where "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question").

[8] *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998); *Gassie v. SMH Swiss Corp.*, No. Civ. A. 97-3557, 1998 WL 71647 (E.D. La. Feb. 17, 1998); *Northeast Ohio Reg'l Sewer Dist. v. Advanced Med. Sys., Inc.*, 666 N.E.2d 612 (Ohio Ct. App. 1995). A contrary decision by the magistrate in *Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325, *aff'd*, CA-98-139 (KSH) (D.N.J. Dec. 14, 1998) (unpublished letter-order & opinion), is flawed for the reasons set forth in the text.

indemnification cases, and neither do the definitions of "public liability" (§ 2014(w)), "nuclear incident" (§ 2014(q)), or any other term that Congress used to identify those cases that are included within "public liability action."

"[I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Respondents' convoluted inverse stacking of definitional provisions violates this "ordinary meaning" rule. Further, some of the operative (as opposed to definitional) provisions of Price-Anderson are explicitly limited to cases involving indemnification agreements[9] and others are not.[10] Under respondents' reading, this specific limitation in some provisions is superfluous because (in their view) the entire statute is already so limited. But, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *E.g., Bates v. United States*, 118 S. Ct. 285, 290 (1997) (citation omitted). A court should "avoid an interpretation of a statute that renders some words altogether redundant." *E.g., United States* v. *Alaska*, 117 S. Ct. 1888, 1918 (1997) (citation omitted).[11]

[9] *E.g.*, 42 U.S.C. § 2210(e)(1) (cap on liability), § 2210(n)(1) (waiver of certain defenses), § 2210(s) (punitive damages ban).

[10] *E.g.*, 42 U.S.C. § 2210(n)(2) (federal jurisdiction and removal), § 2210(n)(3) (special case management for nuclear torts).

[11] The United States observes in its brief (U.S. Br. 28-29 n.16) that the real reason for inclusion of "any other person who may be liable" in § 2014(t) was to ensure that the statute's indemnification provisions would be read *broadly* to cover non-indemnified defendants involved in nuclear accidents for which any relevant party was indemnified. The phrasing cannot be read to have the opposite effect: to void the *general* provisions of Price-Anderson in the absence of an indemnification agreement. Respondents thus wrongly imply (Resp. Br. 7 & 31) that the

(...continued)

Wholly apart from indemnification issues, Congress had good reason when enacting the 1988 Amendments to apply Price-Anderson to *all* torts arising out of nuclear incidents. In the wake of Three Mile Island, Congress saw the need to "expand[] existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court." S. Rep. No. 100-218, at 13 (1987). For example, "[t]he availability of the provisions for consolidation of claims in the event of any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation."[12] There is, accordingly, no basis for respondents' claim (Resp. Br. 35-36) that Congress's sole interest in the 1988 Amendments was to address federal indemnification cases.[13]

United States' reading of § 2014(t) supports their own. In fact, the United States expressly rejects respondents' position. U.S. Br. 27-30.

Equally misleading is respondents' suggestion (Resp. Br. 31) that their argument is supported by *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 & n.12 (1984). The Court in *Silkwood* merely cited § 2014(t) for the proposition that government indemnification was not available under the facts of that case. The decision preceded the 1988 Amendments and did not involve construction of "public liability action" or any other provision relevant to the present issues. *See Kerr-McGee v. Farley*, 115 F.3d at 1504 (rejecting the argument that *Silkwood* supports a requirement for an indemnification agreement for Price-Anderson to apply); U.S. Br. 30 n.18 (same).

[12] *Id. See also, e.g.*, H.R. Rep. No. 100-104, at 29 (1987) (amendment providing for consolidation of claims involving "all nuclear incidents" in federal court under Price-Anderson "is necessary to ensure the equitable and uniform treatment of all victims and the coordination of all phases of litigation that could result from a large nuclear accident, even though the accident may not constitute an 'extraordinary nuclear occurrence'").

[13] Respondents also argue (Br. 34-35) that, because the definition of "extraordinary nuclear occurrence" (42 U.S.C. § 2014(j)) is limited to situations involving indemnification agreements and because the term "nuclear incident" includes "extraordinary nuclear occurrences" (§ 2014(q)), the limitation of one should be read into the other. But "nuclear incident" is expressly defined as "*any* occurrence, *including* an ex-

(...continued)

c. Respondents' final effort to obtain a judicial narrowing of Price-Anderson is to argue, for the first time in this litigation, that constitutional concerns may have motivated Congress to intend a narrower scope for the statute than its plain language suggests. Specifically, respondents say that Price-Anderson presents Article III problems as applied to mining-related claims because in such a case it is a "pure jurisdictional statute," simply assigning state causes of action to federal courts with no substantive federal content. Resp. Br. 36-38. The argument is entirely without merit.

No Article III issue is presented when Congress enacts a statute within its Article I powers and confers jurisdiction on federal courts to hear suits arising under that statute. Here, Congress' authority under Article I to legislate in the field of nuclear energy and safety – a subject "vital to the common defense and security" (42 U.S.C. § 2012(a)) – cannot be doubted.[14] And, the 1988 Amendments do not – as respon-

---

traordinary nuclear occurrence" (*id.*, emphasis added), thus confirming the obvious: that the term "nuclear incident" is more inclusive than "extraordinary nuclear occurrence." *See Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"). Further, in the 1988 Amendments, Congress substituted the term "nuclear incident" for "extraordinary nuclear occurrence" in Price-Anderson's jurisdiction and removal provisions, specifically for the purpose of broadening their scope to embrace all nuclear incidents. 1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2); *see* Pet. Br. 18-19. Respondents would reintroduce a limitation that Congress expressly eliminated.

[14] *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1147 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972):

> [T]here can be no doubt but that Congress was acting within its constitutionally delegated authority in establishing a system of regulation over the entire spectrum of atomic energy, including the imposition of federal controls over health and safety standards. Congressional findings concerning the development, use and control of atomic energy demonstrate reliance upon the constitutionally granted powers over the

(...continued)

dents suggest – create federal jurisdiction for state claims; rather, the amendments both provide a cause of action under federal law (42 U.S.C. § 2014(hh)) and then separately confer jurisdiction upon federal courts to hear such actions (*id.* § 2210(n)(2)).[15] A case "arises under" federal law when, as here, federal law "creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).[16]

Nor is a constitutional issue presented because Congress determined that certain substantive rules for decision in Price-Anderson federal actions should be derived from state law. In a variety of contexts – *e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), the Assimilative Crimes Act, 18 U.S.C. § 13, the Federal Reservations Act, 16 U.S.C. § 457, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* – Congress has adopted state substantive law.[17] This

---

common defense and security, interstate and foreign comerce and promotion of the general welfare.

[15] *See TMI*, 940 F.2d at 857 (Congress provided "the clearest expression of intent that there be a federal cause of action arising directly under the Act"); *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-100 (7th Cir. 1994) ("a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action"); H.R. Rep. No. 100-104, pt. 1, at 18 (1987) (Congress intended to "mak[e] suits asserting public liability '[c]ases arising under the [l]aws of the United States' within the meaning of Article III") (internal ellipsis omitted).

[16] Price-Anderson is thus readily distinguishable from the statute in *Mesa v. California*, 489 U.S. 121 (1989), the case on which respondents principally rely. There, the Court was dealing with a provision under which state law claims – presenting no federal law issues – were removable to federal court *as state law actions*. Also distinguishable are decisions construing 28 U.S.C. § 1331 (Resp. Br. 38 n.33) because Article III "arising under" jurisdiction is broader than federal-question jurisdiction under § 1331. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

[17] The legislative history of the 1988 Amendments indicates that Congress modeled its approach on the Outer Continental Shelf Lands Act. (...continued)

does not mean that "no federal substantive standards apply." Resp. Br. 38. Although borrowed in part from state law, the standards applied in a Price-Anderson suit are nonetheless *federal* standards by operation of the statute. Congress has power to enact such an approach; indeed, "the power of Congress to confer federal jurisdiction in these cases and to give content to the federal law by adopting state rules of decision has never been questioned." *TMI*, 940 F.2d at 856 (citations omitted).[18]

Moreover, there are significant federal law components to Price-Anderson suits, even apart from the federal standards that are borrowed from state law. For example, section 2014(hh) imposes a specific choice-of-law rule – "the law of the State in which the nuclear incident involved occurs" – even if state (or, for that matter tribal) choice-of-law rules would call for a different result. And, in resolving disputes ranging from the consolidation of related cases, to the applicability of a federal standard of care, and to the meaning and relevance of licenses, contracts, and leases issued by the federal government, the court will have to interpret the Atomic Energy Act and other relevant federal statutes. *E.g.*, Pet. Br. 21; U.S. Br. 18; Resp. Br. 6 & n.5. Significant federal law

---

See H.R. Rep. No. 100-104, at 18; *TMI*, 940 F.2d at 855-56; U.S. Br. 18 n.10.

[18] Respondents' summary of the 1988 legislative history on this point is misleading. In the very testimony that they cite as "the only apparent substantial response" to a supposed "congressional concern" about the constitutionality of the 1988 Amendments (Resp. Br. 36-37), Congress was told that "it is not necessary for Congress to provide the substantive standards for recovery in a given action in order to support a grant of subject matter jurisdiction over that action," and that "when Congress has the power to enact substantive rules in a given field, it also has the power to draw controversies which may implicate construction or effectuation of its enactment or policies into a federal forum." *Reauthorization of the Price-Anderson Act, Hearings Before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 90-91 (1986) (citations omitted).

issues will inherently be involved in every Price-Anderson suit.

Finally, section 2014(hh) is clearly constitutional when viewed in the fuller context of the AEA and the Price-Anderson Act. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), a Dutch corporation brought suit in federal court against Nigeria for breach of contract. Jurisdiction was based on the Foreign Sovereign Immunities Act, which confers jurisdiction in federal court over suits between aliens and foreign states. 28 U.S.C. § 1330(a). Although the cause of action was not based on federal law (it was based either on state law or international law), the Court nevertheless upheld jurisdiction under Article III. "By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." 461 U.S. at 493. Further, "the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme. The Act . . . does not merely concern access to the federal courts." *Id.* at 496.

Likewise here, section 2014(hh) of Price-Anderson is part of a "comprehensive scheme" – an extensive federal program dealing with a subject of vast national importance. As part of that program, Congress exercised its Article I powers to decide whether and under what circumstances claims growing out of a nuclear incident should be compensable, and what procedures and forums should be available to ensure fair, equitable and efficient treatment. This decision to convert any and all nuclear tort suits into "action[s] arising under" federal law (42 U.S.C. § 2014(hh)) as "part of [a] comprehensive scheme" (*Verlinden*, 461 U.S. at 496) is undoubtedly constitutional.

* * * *

Accordingly, there is no serious Article III obstacle to applying Price-Anderson as Congress has written it. Respondents pleaded only tribal claims in tribal court,[19] and they now concede that those claims cannot stand if – as we have shown – they are within Price-Anderson. The claims in tribal court are therefore preempted.[20]

B. Tribal Exhaustion on the Preemption Issue Would Serve No Useful Purpose and Would Frustrate the Basic Objectives of Price-Anderson.

A fundamental purpose of the Price-Anderson Act is to "encourage the equitable, prompt, and efficient resolution of cases arising out of [any] nuclear incident." 42 U.S.C. § 2210(n)(3)(c)(vi); *see also* S. Rep. No. 100-218, at 4 (1987) (the Act provides a mechanism that is "equitable, efficient, reliable, and comprehensive"). Thus, once it is clear that tribal law claims have been preempted by Price-Anderson, unwarranted and futile litigation should be halted. Exhaustion of tribal remedies would "serve no purpose other

---

[19] While respondents' brief seeks to muddy the waters on this point, they conceded in the lower courts that the tribal court proceedings involved only "Navajo common law claims" and that "no relief [under Price-Anderson] has been sought." *E.g.*, Defendants-Appellees' Joint Opening Brief to the Ninth Circuit, at 1 & 4 n.1 (Jan. 9, 1997). *See also* App. 81a.

[20] Respondents suggest that the cause of their injuries was "perhaps not limited to source materials." Resp. Br. 38. Even if true, Price-Anderson would nonetheless apply. *See, e.g., Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1240-42 (7th Cir. 1985) (AEA federal preemption precludes state regulation of an inseparable mixture of AEA-regulated and -unregulated materials). It would obviously be inefficient and cumbersome to have some elements of a toxic tort case heard in tribal court and other elements in federal court. Respondents could readily include in a federal Price-Anderson suit any claims that source-material injuries were enhanced by associated non-AEA materials. *Cf.* 28 U.S.C. § 1367 (supplemental jurisdiction).

than delay" (*Strate v. A-1 Contractors*, 520 U.S. 438, 460 n.14 (1997)) and would undermine Price-Anderson's objectives. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985) (exhaustion is not required where, *e.g.*, it would be futile or contrary to express jurisdictional prohibitions).[21]

Strate made clear that the tribal exhaustion doctrine should not be applied in an inflexible, mechanical fashion.[22] Respondents argue, nonetheless, that *Strate* is relevant only where the objection to tribal proceedings is territorial rather than substantive. Resp. Br. 21-22.[23] But, notwithstanding that the exhaustion doctrine was judicially developed and is subject to judicial exceptions (*National Farmers*, 471 U.S. at 856 n.21), notwithstanding that it is "prudential" rather than jurisdictional (*Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 & 20 n.14 (1987), and notwithstanding that it is "not

[21] The need for an early definitive ruling on preemption is shown by a proliferation of new tribal court complaints raising tribal law claims similar to respondents'. In recent weeks, petitioners have been named in three such suits in which multiple plaintiffs seek compensatory and punitive damages totaling $300 million. *Allison, et al. v. Cyprus Foote Mineral Co., et al.*, No. KY-CV-172-98 (Navajo Dist. Ct., Kayenta); *Todacheenie, et al. v. Rare Metals Corp. & El Paso Natural Gas Co.*, No. TC-CV-267-98 (Navajo Dist. Ct., Tuba City); *Yazzie, et al. v. Cyprus Foote Mineral Co. et al.*, No. TC-CV-266-98 (Navajo Dist. Ct., Tuba City).

[22] Pet. Br. 29-30. Respondents quote a phrase in *Granberry v. Greer*, 481 U.S. 129, 131 (1987), that they suggest shows that the tribal exhaustion rule should be "an inflexible bar to consideration of the merits." Resp. Br. 20. But, in considering federal/state exhaustion questions in that habeas corpus action (Indian law issues were not involved), the Court in fact *rejected* such an approach. Although the Court cited *National Farmers* and *Iowa Mutual*, using a "*cf.*" signal, as examples of an "inflexible" exhaustion rule, the passage is hardly an endorsement of inflexibility.

[23] Petitioners do not concede that, under the standards of *Montana v. United States*, 450 U.S. 544 (1981), their activities on leased tribal lands and pursuant to AEC contracts subjected them to the territorial jurisdiction of the tribe (wholly aside from the Price-Anderson issues presented here). That question is not before the Court.

an unyielding requirement" (*Strate*, 520 U.S. at 449 n.7), respondents offer no logical rationale for this distinction. The issue should be, as in *Strate*, whether exhaustion would serve potentially beneficial objectives – such as where a tribal court's findings and conclusions on tribal law may inform the federal court on relevant issues. But where – as here – a non-member of a tribe has properly invoked federal court jurisdiction and has properly pleaded a claim that tribal proceedings against the non-member exceed the tribe's authority under federal law, and especially where the merits of that claim can be decided as a straight issue of federal law, the exhaustion doctrine should not preclude prompt resolution.[24]

As the United States has argued (U.S. Br. 13-17), this conclusion is particularly compelling in the context of Price-Anderson. Important federal interests prompted Congress to provide an exclusive federal remedy for nuclear torts, to enact a special scheme of procedural, substantive, and remedial provisions for those claims, and thereby to effect "complete preemption" of non-federal remedies.[25] Respondents, in answering the United States' argument, focus almost entirely on the issue of removal, claiming this is a necessary predicate to a federal court's application of the complete preemption doctrine. Resp. Br. 16, 25-26. But this response misses the point. While the issue of complete preemption "tends to come up in removal situations," that is by no means its exclusive province. 13 Charles A. Wright, *et al.*, *Federal Prac-*

[24] Indeed, even if the issue were not "plain" and further development of the factual record were necessary on the question of Price-Anderson preemption, federal rather than tribal courts would be the proper forum to make that inquiry. *See* U.S. Br. 26-27.

[25] Respondents cite *Silkwood* as refuting the preemption point, since the Court there concluded that state tort claims were not preempted by the AEA or the Price-Anderson Act as it then existed. Resp. Br. 24-25. But *Silkwood* preceded the 1988 Amendments with its adoption of section 2014(hh). Pet. Br. 16-19; U.S. Br. 17. "With the Amendments Act . . ., the entire Price-Anderson landscape was transformed." *TMI*, 940 F.2d 832 at 857.

tice and Procedure § 3522 (2d ed. Supp. 1998) (citing cases). Here, petitioners do not need a removal statute; unquestionably, the federal courts have original jurisdiction under 28 U.S.C. § 1331 to consider the claim that the tribal court proceedings exceed the tribe's adjudicatory authority over nonmembers.[26]

The question, then, is whether the tribal exhaustion doctrine compels the federal court to forebear from exercising its undisputed jurisdiction. As the United States explains (U.S. Br. 14-20), Congress created a preemption regime in part to give defendants an absolute right to *immediate* federal court resolution of any threshold dispute concerning whether a nuclear liability suit falls within Price-Anderson. Having jurisdiction, the federal court is empowered – indeed, obligated – to decide that issue. Prolonged delays for the exhaustion of tribal remedies would be contrary to the congressional regime and at odds with a principle of exhaustion that is supposed to be "prudential" and "not unyielding." *Strate*, 529 U.S. at 449 n.7 & 453.

C. Having Failed To Appeal the District Court's Injunctions, Respondents May Not Assert Price-Anderson Claims in Tribal Court.

As respondents conceded below (*see* note 19 *supra*), their complaints in tribal court rested entirely on Navajo

[26] *See Strate*, 520 U.S. at 448; *National Farmers*, 471 U.S. at 850-53. *Strate* specifically noted that no removal statute was available in that case (520 U.S. at 459 & n.13), but the Court nonetheless addressed the federal law issues raised by the challenge to the tribal proceedings.

Amicus curiae Navajo Nation argues that petitioners had available a removal statute, but waived their opportunity to use it. Navajo Nation Br. 6 n.4. Bur its brief misquotes the statute (42 U.S.C. § 2210(n)(2)), which by its terms applies to state court proceedings only. With respect to tribal court proceedings, petitioners correctly invoked their § 1331 remedy.

tribal law and "no relief [under Price-Anderson] has been sought." Indeed, they proved their disinterest in litigating Price-Anderson claims in tribal court by not appealing the injunctions against them on that very issue. They cannot change horses now.

The Federal Rules impose specific time limits within which either to appeal or cross-appeal a preliminary injunction. Fed. R. App. P. 4(a)(1) (appeal) & 4(a)(3) (cross-appeal).[27] Such rules are jurisdictional prerequisites, not optional procedures. Rule 4(a)(1) is "mandatory and jurisdictional" (*Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264 (1978)), and the same conclusion applies to Rule 4(a)(3) under the teaching of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988). As *Torres* made clear:

> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed . . . within the time prescribed . . . [and] compliance with the provisions of those rules is of the utmost importance." 28 U.S.C.App. p. 467. This admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a *single jurisdictional threshold.*

487 U.S. at 315 (emphasis added). As a result, courts "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2." *Id.* at 317.[28]

[27] Although respondents claim otherwise (Resp. Br. 13 n.16), an appeal from a preliminary injunction *cannot* be made "at any time." Rather, such an appeal is subject to the same limits applicable to any other interlocutory appeal. *See Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976); 16 Wright, *Federal Practice and Procedure* § 3921.

[28] Contrary to respondents' insinuation (Resp. Br. 43), the 1993 amendments to Rule 3(c) – designed to halt satellite litigation, *see* Fed. R. App. P. 3 Adv. Comm. Note – did *not* "change the mandatory nature of the time limits in Rules 3 and 4" underscored by *Torres*. *Johnson v. Teamsters Local 559*, 102 F.3d 21, 29 n.4 (1st Cir. 1996). In addition, their argument (Resp. Br. 42-43) that dicta in *Langnes v. Green*, 282 U.S.

(...continued)

Rule 4(a)(3) must therefore be treated as a "mandatory and jurisdictional" provision – not merely a discretionary "rule of practice."[29]

Even if Rule 4(a)(3) were, however, treated as a "rule of practice," waiver of its requirements should be allowed only in truly exceptional circumstances,[30] particularly where the parties are represented by experienced litigation counsel and thus presumably made a knowing election not to appeal. To allow "jurisdiction by ambush" in the courts of appeals would inject surprise into the process, preclude fair presentation of unappealed issues, and result in wasteful and unstructured litigation.

D. Tribal Courts Lack Jurisdiction To Hear Price-Anderson Claims.

If the Court were to reach the issue, it should nonetheless uphold the injunctive orders of the district court. As the

---

531, 537 (1931), trump the holdings of *Torres* and *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), is riddled with flaws. *See Marts v. Hines*, 117 F.3d 1504, 1515 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 716 (1998).

[29] *See, e.g., Johnson*, 102 F.3d at 29 (Rule 4(a)(3) "is mandatory and jurisdictional" under *Torres*); *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1049 n.1 (3d Cir. 1993) (distinction between Rules 4(a)(1) and 4(a)(3) "is illusory in light of" *Torres*); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1416 (7th Cir. 1989) (*Torres* "made clear" that Rule 4(a)(3) cannot be waived); *see also Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289 (5th Cir. 1992) ("continued viability" of "rule of practice" principle "questionable" under *Torres*); *Stockstill v. Petty Ray Geophysical, Div. of Geosource, Inc.*, 888 F.2d 1493, 1496, 1497 (5th Cir. 1989) ("rule of practice" approach "doubtful" after *Torres*). Even *before Torres*, four circuits had characterized Rule 4(a)(3) as "mandatory and jurisdictional." *See Young Radiator*, 881 F.2d at 1416.

[30] *See, e.g., Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 668 (5th Cir. 1983) (no "exceptional circumstances producing great inequity are here shown of the extra-ordinary nature that on rare occasions has induced" waiver) (a pre-*Torres* case).

United States has convincingly demonstrated (U.S. Br. 22-24), fundamental objectives of the Price-Anderson Act would be frustrated if tribal court adjudications could undermine a basic premise of that Act – the availability of a federal forum and special consolidation and case-management procedures for all nuclear torts, at the request of either the defendant or the United States. *See* 42 U.S.C. § 2210(n)(2) & (3); *see also* Pet. Br. 35. This may be most obvious in cases for which Price-Anderson's financial protection provisions are triggered, thus requiring the United States' participation in the suit or oversight of the distribution of compensation funds by a federal judicial panel. *See, e.g., id.* § 2210(h), (i), (m) & (o). But, as the instant cases illustrate, virtually all Price-Anderson nuclear incident claims will be complex, will spawn multiple and related suits (*see* note 21 *supra*), and will involve questions of federal government contribution and comparative fault, if not federal indemnity.[31]

Moreover, *Strate* articulated an important principle applicable here: "As to nonmembers, we hold, a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction." 480 U.S. at 453; *see* Pet. Br. 29-30. By virtue of the Atomic Energy Act, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983); *see* Pet. Br. 9-10. Given that the AEC (and later NRC) did not exercise plenary jurisdiction over all aspects of uranium mining (*see* pp. 4-5 *supra*), one might debate whether tribal jurisdiction to regulate mining was or was not preempted and to what degree.[32] The

---

[31] In *Richards*, for example, Cyprus' attempt to file a third party complaint against the United States was rejected by the tribal court, and the case also involves defenses based on federal regulation and comparative fault by the federal government. *See* Pet. Br. 23 & n.37.

[32] Where there is a comprehensive federal regulatory scheme, but where as a policy matter a portion of the regulated field is intentionally left (...continued)

Court need not decide that question, however. What is clear here is that the Atomic Energy Act, with its Price-Anderson component, preempts whatever authority the tribe might otherwise have to legislate on the subject of tort liability for nuclear incidents. 42 U.S.C. § 2014(hh). Thus, whatever the tribe's authority might be in other situations, it lacks the authority to legislate as to nuclear claims and thus the authority to adjudicate claims brought under the Price-Anderson Act.

CONCLUSION

The rulings of the court of appeals should be reversed. Respondents' proper course is to file Price-Anderson claims in federal court.

Respectfully submitted,

Lynn H. Slade
Walter E. Stern
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

James R. Atwood*
Richard A. Meserve
COVINGTON & BURLING

Tom Galbraith
MEYER HENDRICKS & BIVENS, P.A.

Attorneys for Petitioners
*Counsel of Record

February 16, 1999

---

without federal control, preemption may nonetheless be found for the entire field. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).